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Fonseca v. Corral Agriculture, Inc. Appellant's Brief Dckt. 40578

RICHARD L. HAMMOND, I. S. B. #6993
HAMMOND LAW OFFICE, PA
811 East Chicago Street
Caldwell, Idaho 83605
Telephone: (208) 453 - 4857
Facsimile: (208) 453 - 4861
Attorney for Claimant-Appellant

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MARCO ANTONIO FONSECA, Claimant/Appellant v. CORRAL AGRICULTURE, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants/Respondents.	SUPREME COURT No: 40578-2012

BRIEF OF THE CLAIMANT/APPELLANT

APPEAL FROM THE IDAHO INDUSTRIAL COMMISSION

Alan Reed Taylor, Referee
Thomas P. Baskin, Chairman
R.D. Maynard, Commissioner
Thomas E. Limbaugh, Commissioner

Richard L. Hammond
Hammond Law Office, P.A.
811 E. Chicago St.
Caldwell, ID 83605

ATTORNEY FOR CLAIMANT/APPELLANT

David J. Lee
Statehouse Mail
P.O. Box 83720
Boise, ID 83720-0044

ATTORNEY FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

IDAHO CONSTITUTION AND STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

The Claimant/Appellant seeks review of the Idaho Industrial Commission (hereinafter "the I.C." or "the Commission") order denying that he suffered an accident while in the course and scope of employment. The Commission had jurisdiction to hear the case pursuant to Idaho Code § 72-506. This Court has jurisdiction to hear an appeal of the Commission's order pursuant to Article V, § 9 of the Idaho Constitution, I.C. § 72-724 and § 72-1368(9), and Idaho Appellate Rules 4 and 14(b).

The Claimant/Appellant timely filed his notice of appeal of the Commission's November 8, 2012 decision on December 13, 2012. *See* I.A.R 14(b) (The Claimant has an appeal as a matter of right by filing a notice of appeal with the Commission within 42 days of an order of the Commission).

ISSUES PRESENTED ON APPEAL

I. DID THE REFEREE AND THE INDUSTRIAL COMMISSION ERR AS A MATTER OF LAW OR ABUSE THEIR DISCRETION WHEN THE CLAIMANT WAS REFUSED TO PROVIDER A COMPLETE COPY OF THE AGENCY RECORD TO CLAIMANT AND REFUSED TO AUGMENT THE RECORD?

II. DID THE REFEREE AND THE INDUSTRIAL COMMISSION ERR AS A MATTER OF LAW OR ABUSE THEIR DISCRETION WHEN THEY DENIED ADMISSION OF CLAIMANT-APPELLANT'S MEDICAL RECORDS, WHICH WERE CREATED IN THE HIS NATIVE LANGUAGE, IN VIOLATION OF IDAHO JUDICIAL RULES OF PRACTICE AND PROCEDURE G AND IDAHO RULES OF EVIDENCE?

III. DID THE REFEREE AND THE INDUSTRIAL COMMISSION ERR AS A MATTER OF LAW OR ABUSE THEIR DISCRETION WHEN THEY DENIED THE ADMISSION OF CLAIMANT-APPELLANT'S MEDICAL RECORDS, WHICH WERE CREATED IN THE HIS NATIVE LANGUAGE, UNLESS CLAIMANT COULD AFFORD A CERTIFIED TRANSLATION IN VIOLATION OF CLAIMANT-

APPELLANT'S STATE AND FEDERAL EQUAL PROTECTION AND DUE PROCESS RIGHTS?

IV. DID THE REFEREE AND THE INDUSTRIAL COMMISSION ERR AS A MATTER OF LAW OR ABUSE THEIR DISCRETION WHEN THEY WITHDREW CLAIMANT'S COURT APPOINTED TRANSLATOR AND REFUSED TO ALLOW THE COURT INTERPRETER TO ORALLY TRANSLATE THE REMAINDER EXHIBITS AFTER CLAIMANT WITHDREW VARIOUS RECORDS TO LIMIT THE NUMBER OF DOCUMENTS TO TRANSLATE IN VIOLATION OF CLAIMANT'S STATE AND FEDERAL SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS?

V. DID THE REFEREE AND THE INDUSTRIAL COMMISSION ERR AS A MATTER OF LAW OR ABUSE THEIR DISCRETION WHEN THEY FAILED TO GRANT THE RELIEF REQUESTED IN CLAIMANT-APPELLANT'S FIRST AND SECOND VERIFIED MOTION FOR SANCTIONS WHICH REQUESTED SANCTIONS OR AN ORDER TO COMPEL FILED ON OR ABOUT THE FIRST OF SEPTEMBER 2011 AND THE ASSOCIATED ORDERS ON MOTION DATED NOVEMBER 4, 2011 AND FILED ON OR ABOUT THE 23RD OF NOVEMBER 2011?

VI. DID THE COMMISSION ABUSE THEIR DISCRETION AND/OR LACK SUBSTANTIAL AND COMPETENT EVIDENCE WHEN THEY DETERMINED THAT THE CLAIMANT/APPELLANT DID NOT PROVDE THAT HE SUFFERED A WORK-RELATED ACCIDENT WHILE PICKING APPLES FOR CORRAL AGRICUTURE AT WILLIAM'S ORCHARDS ON OR ABOUT SEPTEMBER 10, 2010?

STATEMENT OF THE CASE

The Claimant/Appellant (hereinafter "Mr. Fonseca") is a 52 year old monolingual Hispanic manual laborer who was employed by the Defendant for various years until approximately October 1, 2010. He was injured on or about the September 10, 2010 in the presence of various coworkers and gave notice to the employer and their agents within 60 days. However, the Defendants allege that they did not receive notice of the accident until the first week of December 2010. The Industrial Commission found that Mr. Fonseca had not proved that he suffered an injury while in the course and scope of duty in its order dated November 8, 2012, from which he appealed on December 13, 2012.

FACTS

Corral Agriculture, Inc. was contracted by Williamson Orchards to provide field laborers to pick apples in September 2010 on the orchard of Williamsons in Caldwell. (Transcript of Hearing page 220 lines 3 to page 221 line 8 and page 225 line 9 to 15) (Hereinafter "T.H. 220:3 - 221:8; 225:9 - 15")

Mr. Fonseca testified that he was working at the Williamson Orchard picking apples on September 10, 2010when he fell from a ladder, landing on his gluteus, and hurt his feet, hip, and back to his neck. (T.H. 74:25-76:5). He also testified that there were and about five or six coworkers in the area. (T.H. 76:10-13).

His coworkers continued working for various days at the Williamson Orchard. However, Mr. Fonseca did not work at the Williamson Orchard after September 10, 2010. (Claimant's Exhibit 12 Deposition page 13 lines 3 – 20), (hereinafter "C12; 13:3 - 20"); (C20; 1 - 12 of Deposition of Roger Williamson).

The Defendants presented no evidence to refute Mr. Fonseca's testimony that he was working for the Defendant on September 10, 2010 picking apples from a ladder as reflected in Mr. Fonseca's drawing documented in his deposition exhibit and C16 and C17; and fell off a ladder while picking apples; (T.H. 74:17 – 75:17), that Mr. Fonseca injured his neck, back, hip down to his feet; (T.H. 75:21 - 23), that there were approximately five or six people present when he fell; (T.H. 76:10 – 13); that Mr. Fonseca was previously trained and advised to notify the owner of the Orchard in the event of the accident; (T.H. 76:14 – 18) and that Mr. Fonseca notified the owner of the Orchard immediately of the accident who advised Mr. Fonseca to attempt to work on the bottom without a ladder for a few hours (T.H. 78:5 – 25).

Mr. Fonseca subsequently gave notice to Jorge Coronado, Sr. and Luisa Corral within two weeks after the accident who then advised Mr. Fonseca to take the matter back to the Williamson Orchard as they were the responsible party. (T.H. 81:21 – 83:4). Mr. Fonseca was then transferred two weeks later to lighter duty work throwing leaves into a grinder for a couple weeks. (T.H. 85:21 – 86:20).

After Mr. Fonseca advised Jorge Coronado and Roberto Corral Sr of the accident and need for money for medication from the accident. Defendant gave Mr. Fonseca $200.00 cash. (T.H. 83:13-16). Approximately one month after the accident Mr. Fonseca put a letter in the mail box of Roberto Corral, Sr. (T.H. 83:23 – 84:4).

Mr. Fonseca called Roberto Corral, Jr. at the end of November or beginning of December. regarding need for funds and Jr. met Mr. Fonseca the first week of December 2010 at the mall regarding bounced check and need for funds regarding the accident. Mr. Corral gave Mr. Fonseca cash to replace the check. (T.H. 297:17-25 and TH 88:23 –89:22).

Mr. Fonseca submitted a written notice of the accident on the 21st of December 2010 with a diagnosis of "Hip Injury" including medical restrictions for the Mr. Fonseca to be sent home until he was seen by Jobcare. (C1:2 - 3). Mr. Fonseca reported to the Emergency Room on visits after December 2010 including January 7, and June 27, 2011, and presented continuing complaints of pain regarding the work injury of September 2010. These complaints included hip pain down to the bottom of his foot and issued pain medication. (C7:82 - 84; C8:97 - 112)

Mr. Fonseca's medical records on February 2, 2011reflect a diagnosis of low back pain with left radiculopathy status post falling from a ladder. Mr. Fonseca demonstrates symptoms consistent with a lumbar derangement with unilateral or asymmetrical symptoms below the knee. Mr. Fonseca also demonstrated complication with the low back, foot, calf, thigh, buttock etc. (C6:58) and such symptoms and complications despite treatment for over two weeks (C6:52, 54 - 62, 64 - 66)

Mr. Fonseca underwent an MRI on the February 24, 3011 because of low back pain extending into the lower extremities, which demonstrated disk bulging at L5 and L4 - L5. (C5:46 – 47). He underwent Physical Therapy wherein Mark Colin, LPT, gave the opinion letter on the January 4, 2012 that Mr. Fonseca's condition and treatment was "highly likely" caused by his fall from the ladder on September 10, 2010, and that Mr. Fonseca's work restrictions continued from December 15, 2010 to the date of the letter. (C9:114 - 117)

The Referee Ordered production of the names, telephone numbers, and addresses of all Employer's employees during the period of September 5-26, 2010. (T. R. 36, 51) The Defendants acknowledge that the list of employees working for the defendant employer between September 5-26, 2010 had never been provided. (T.R. 45, 51). The Defendants Roberto Corral, President, Jorge Coronado supervisor, and Luisa Corral, Secretary, failed to appear at the deposition scheduled and properly noticed up on the September 1, 2011 (C10:2 - 6).

Roberto Corral, Sr. and Luisa Corral also failed to appear for the second date for deposition scheduled and noticed for December 15, 2011. (C11:1 - 2) It appears Roberto Corral was deported. However, the record does not reflect why Luisa was not present, or why either party was not present telephonically. However, the Referee neither required the Defendant's comply with the Order to Produce Discovery, nor did the Referee respond to the Motion for Sanctions. (T.R. 38, 51).

WITNESSES OF ACCIDENT AND CLAIMANT'S COWORKERS

The Defendants failed to provide any record of any attempt to locate the various coworkers that were working on the September 10, 2010 while Mr. Fonseca established a record of attempts to locate each and every employee of the Defendant that was working in September and October 2010.

Jorge Coronado testified that he did not recall the accident or receive notice. However, he also testified that he did not provide Mr. Fonseca any written instruction of whom Mr. Fonseca was to notify in case of an accident and that he had not given Mr. Fonseca any oral instructions of whom to notify in case of an accident. (T.H. 287:12-24). Mr. Coronado also testified at the hearing and at his deposition that he did not start working at the Williamson Orchard until the September 17 or 18, 2010, one week after the accident. (T.H. 291:1 – 13)(C15;5:10 - 18)

The Defendants failed to present testimony of coworkers that were working on the September 10, 2010 to contradict the signed letters provided by Nazario Marquez and Bruno Aguilar. (C19:1 - 6)

TESTIMONY OF SARAI E. FONSECA: Daughter of Claimant

Sarai Fonseca testified that Mr. Fonseca informed her on September 10, 2010 that he fell from a ladder at work picking apples. She further testified that Mr. Fonseca had his leg up on a pillow and complained of hip and leg pain. Moreover, she testified that Mr. Fonseca did not demonstrate similar symptoms nor did he have a history of complaining of pain prior to September 10, 2010. (T.H. 167:18 - 170:25). Finally, she testified that Mr. Fonseca returned to work for the Defendant with very light work after the above accident. (T.H. 172:12 - 16)

TESTIMONY OF ANA FONSECA: Wife of Claimant

Ana Fonseca testified that she picked up Mr. Fonseca from work on the September 10, 2010 from working in the orchard, after receiving a phone call from Mr. Fonseca. He told her that he had fallen that day at work from a ladder and that he reported the injury to the Defendants. However, they did not believe him and demanded he continue to work. (T.H. 175:20 - 176:16; TH 187:15 - 17).

Mrs. Fonseca testified that she gave Mr. Fonseca Tylenol due to symptoms of left side pain in his hip and put his leg up on a pillow after they returned home. (T.H. 179:8 – 21). She further testified that Mr. Fonseca did not seek immediate medical care due to lack of insurance or funds. (T.H. 197:1 - 8).

Mrs. Fonseca also testified that she heard Mr. Fonseca report the accident again telephonically within a week, and that he discussed the accident with Roberto "Tito" Corral. (T.H. 199:16 - 21; 202:9 - 14). She further testified that she drove Mr. Fonseca to the home of Mr. Corral and his daughter to follow up regarding the accident within a month of the accident where she witnessed Mr. Fonseca speaking with a woman. Mrs. Fonseca also overheard Mr. Fonseca make calls to Mr. Corral after the accident. (T.H. 176:17 - 178:19). Finally she testified that the Defendants never contacted her to investigate the accident. (T.H. 180:8 - 181:5).

TESTIMONY OF ROGER L. WILLIAMSON, President of Williamson Orchards (C12)

Mr. Williamson, the President and records Custodian of Williamson Orchards, recalled discussions he had with counsel herein on the February 19, 2011, and deposition in September

2011. (T.H. 203:13 - 204:10). Records provided to Williamson Orchard by the Defendant reflected that Mr. Fonseca worked at the Orchard up until the September 10, 2010. (T.H. 205:1 - 6).

Mr. Williamson recalled being notified on the September 10, 2010 by John Williamson, the Vice President, regarding an accident that month which involved a worker of Corral who slipped off the ladder, that the worker didn't want to work on the ladder anymore, that there was no more work available, and the worker's supervisor sent him somewhere else. (T.H. 206:14 - 22; 213:4 - 15: 214:16 - 23). Mr. Williamson testified that he was not aware of any attempts by Corral Agriculture or the Idaho State Insurance Fund contacting him to investigate the claim; but recalls being contacted by Counsel for Mr. Fonseca in February 2011. (T.H. 205:11 - 206:12).

During that conversation, he recalls speaking telephonically with John Williamson regarding a worker who was likely Hispanic that had an accident in September 2010. (T.H. 207:16 - 209:5). Mr. Williamson further testified that John Williamson told him this worker was injured on the foot and was instructed to go home to see if he would get better and return if he felt better the next day. (T.H. 210:1 - 211:5). Williamson Orchard records reflect that Mr. Fonseca worked up until September 10, 2010 and did not work after September 10, 2010 (C12; 13:3 - 20).

However, Mr. Williamson stated that an Hispanic person from Mr. Corral's crew was injured in September 2010 by slipping off a ladder and was instructed to go home to see if he would get better. (C12; 16:1 - 16) (C12; 20:3) (C12; 24:21 - 25). Moreover, Corral Agriculture did not have a supervisor present on the September 10, 2010 (C:12; 14:19 - 25).

TESTIMONY OF JOHN C. WILLIAMSON; Vice President of Williamson Orchard

John Williamson testified that was the co-owner and manager of the field operations of Williamson Orchard and responsible to supervise crews. (T.H. 239:12 - 15). Mr. Williamson testified that his brother Roger Williamson's testimony was truthful. (T.H. 239:22 - 240:2).

He further testified that he was not contacted regarding the alleged incident by the Defendants before he was contacted by his brother and Counsel herein in February 2011. (T.H. 240:3-17; 240:22 – 241:1 – 3). Moreover, John Williamson was the employee responsible to

respond to inquiries about accidents in September 2010 and did not have knowledge of any inquiries or investigation by either Defendant herein. (T.H. 241:25 – 243:3)

TESTIMONY OF ROBERTO CORRAL, JR: Vice President of Corral Agriculture, Inc.

Roberto "Tito" Corral, Jr. testified that it was proper for Mr. Fonseca to give notice to Roberto Corral, Sr. of accidents. (T.H. 295:25 – 296:7). He testified that he did not perform any investigation into Mr. Fonseca's accident and would not have done any different investigation if Mr. Fonseca notified him of the accident on November 1, 2010. (T.H. 318:13 – 319:1); (Deposition of Roberto Corral, Jr. 29:14 - 25). Mr. Corral did not attempt to contact any of the witnesses that were working on the September 10, 2010 even though about half of them remained in his employ. (T.H. 321:1 – 18)

After Mr. Coral was made aware that Mr. Fonseca sent letters to the coworkers working in September 2010, and was provided three letters from coworkers working on the September 10, 2010 with Mr. Fonseca during the injury, Mr. Coral did not attempt to contact these witnesses. (T.H. 322:4 – 15)

Roberto Corral Sr. lost his legal permanent residence and was deported due to a felony conviction after tax problems. (T.H. 335:23 – 336:1; 339:8 – 340:6). Mr. Coral was aware that Mr. Fonseca testified that he gave timely notice to his Mr. Coral, sr. and his mother, however he did not obtain or attempt to obtain a letter from his mother or father disputing that Mr. Fonseca gave notice to them also. (T.H. 336:2 – 12).

Finally, Mr. Coral testified that he did not believe any witness had disappeared because the Mr. Fonseca allegedly waited 30 days and that the company was not harmed by the alleged extra 30 days. (T.H. 345:24 – 346:1; 347:24 – 348:1).

ARGUMENT

When reviewing a decision by the Industrial Commission, this Court exercises free review over the Commission's conclusions of law, but will not disturb the Commission's factual

findings if they are supported by substantial and competent evidence. I.C. § 72-732; *Stewart v. Sun Valley Co.*, 140 Idaho 381, 384, 94 P.3d 686, 689 (2004).

I. THE COMMISSION ERRED AS A MATTER OF LAW OR ABUSED ITS DISCRETION WHEN IT REFUSED TO PROVIDE THE CLAIMANT WITH A COMPLETE COPY OF THE AGENCY RECORD AND REFUSED TO AUGMENT THE RECORD.

Idaho Appellate Rule 29, Settlement and Filing of Reporter's Transcript and Clerk's or Agency's Record, states as follows:

> (a) Settlement of Transcript and Record. Upon the completion of the reporter's transcript, the reporter shall lodge the original and all copies with the clerk of the district court or administrative agency. Upon the receipt of the reporter's transcript and upon completion of the clerk's or agency's record, the clerk of the district court or **administrative agency shall serve copies of the reporter's transcript and clerk's or agency's record upon the parties** by serving one copy of the transcript and record on the appellant and one copy of the transcript and record on the respondent. [emphasis added]

Idaho Appellate Rule 28, Preparation of Clerk's or Agency's Record - Content and Arrangement, states as follows:

> (a) Designation of Record. Parties are responsible for designating the documents which will comprise the clerk's record on appeal. The standard record described in subsection (b) is not designed to include many items i.e., motions for summary judgment, affidavits, jury instructions, etc.) which may be pertinent to the appeal in a specific case. Parties are encouraged to designate a clerk's or agency's record more limited than the standard record.
> (b) Content - Standard Record. The clerk's or agency's record shall automatically include the following pleadings and documents, including the following pleadings and documents filed in the magistrates division:
> ...
> (3) In administrative proceedings:
> A. Any order sealing all or any portion of the record.
> B. Any original or amended complaint, petition, application or other initial pleading.

C. Any answer or response thereto.
D. All documents relating to an application or petition to intervene.
E. Any protest or other oppositions filed by a party.
F. Certificate listing A list of all exhibits offered, whether or not admitted.
G. The findings of fact and conclusions of law, or if none, any memorandum decision entered by the agency.
H. The final decision, order or award.
I. Petitions for rehearing or reconsideration or orders thereon.
J. Notice of appeal and any notice of cross-appeal.
K. Any request for additional reporterís transcript or agencyís record.
L. Table of contents and index.

(c) Additional Documents. The clerk's or agency's record shall also include all additional documents requested by any party in the notice of appeal, notice of cross-appeal and requests for additional documents in the record. Any party may request any written document filed or lodged with the district court or agency to be included in the clerk's or agency's record including, but not limited to, written requested jury instructions, written jury instructions given by the court, depositions, briefs, statements or affidavits considered by the court or administrative agency in the trial of the action or proceeding, or considered on any motion made therein, and memorandum opinions or decisions of a court or administrative agency.

(d) Preparation of Record. The clerk shall prepare the record on paper by making clearly and distinctly legible photocopies or other reproductions of all documents included in the record. The clerk shall type or have typed any document which cannot be reproduced in a distinctly legible form.

The Claimant-Appellant, Notices of Appeals requested that the following documents be included in the Industrial Commission's record in addition to those automatically included under Rule 28 I.A.R. (Industrial Commission "Agency Record", 67, 78, and 94)

1. All transcripts, notes, records and audios of all telephonic and in person hearings and telephonic conferences including but not limited to:
   a. The 30th of December 2011.
   b. The 26th of October 2011.
   c. The 10th of January 2012.
   d. The 2nd of March 2012.

2. All exhibits offered, whether or not admitted.
3. All Orders, Motions, Briefs, Responses, Affidavits, Complaints, Answers and other documents filed herein.
4. Claimant's Amended Notice of Appeal
5. Claimant's Motion to Augment the Agency Record filed on or about the 16th of January 2013.

The Claimant-Appellant's Agency Record packet failed to include the following:

1. All transcripts, notes, records and audios of all telephonic and in person hearings and telephonic conferences including but not limited to:
   a. The 30th of December 2011.
   b. The 26th of October 2011.
   c. The 10th of January 2012.
   d. The 2nd of March 2012.
2. All exhibits offered, whether or not admitted.

Claimant requested informally and subsequently in writing (Agency Record 87-88) for the withheld records and for a hearing. Idaho Appellate Rule 29, Settlement and Filing of Reporter's Transcript and Clerk's or Agency's Record, states as follows:

> (a) .... The parties shall have 28 days from the date of the service of the transcript and the record within which to file objections to the transcript or the record, including requests for corrections, additions or deletions. ....Any objection made to the reporter's transcript or clerk's or agency's record must be accompanied by a notice setting the objection for hearing and shall be heard and determined by the district court or administrative agency from which the appeal is taken. After such determination is made, the reporter's transcript and clerk's or agency's record shall be deemed settled as ordered by the district court or administrative agency. The reporter's transcript and clerk's or agency's record may also be settled by stipulation of all affected parties.

The Industrial Commission's determination to deny Claimant's request to augment the record and request for hearing was made within four days on the 25th of January 2013 (Agency Record, 89-91) without giving Claimant the opportunity to have a hearing, before the Defendant

had the opportunity to respond, and before Claimant was able to submit a responsive brief. Further, the arguments and representations made at the hearings outlined above are necessary for the determination of whether the conclusions were accurately based upon the facts and arguments presented therein.

The Supreme Court in *Small v. Jacklin Seed Company*, 109 Idaho 541, 544 (1985) remanded a prior case and recommended a new hearing when the Industrial Commission's Agency record was not complete and stated as follows:

> ...it is the conclusion of this Court that the apparent omission by the Industrial Commission to consider Exhibits 8 and 9 requires this Court to remand the case to the Industrial Commission for reconsideration. The commission may well want to consider a new hearing to obtain an accurate record from which to evaluate appellant's case, considering the apparent inadequacies of the telephone conference record presently before the Court.

The Industrial Commission adopted a "new rule" of not allowing medical records from a Claimant unless they are in English during a recess during the hearing of Mr. Fonseca. Claimant had the right to augment the record upon receipt of the audio to include the "new rule" and Claimant's objection to such new rule including that the "new rule" violated Claimant's Constitutional and Statutory equal protection and due process rights as it placed an unequal burden on minor Claimants who do not speak English and that such additional burden and cost of bearing the burden of providing a certified translation of such medical records was contrary to the express purpose of the Idaho Worker's Compensation statutes to allow prompt and simple payment of benefits for injured employees. As stated by the Industrial Commission in the Decision Herein (Agency Record, 60)

> The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room

for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

The "new rule" violated Claimants state and federal constitutional rights to due process and equal protection under the Fourteenth Amendment when they required the additional burden to non English Speaking minority Claimants. See: United States Constitution, Amendments 5 and 14; and Idaho State Constitution, Article 1, Sections 13 and 18. For English-speaking Claimants do not have the added burden and expense of translation of their medical records, but to add such burden to those who do not speak English, or speaks very little English, would be an unconstitutional classification of that Claimant based upon his race or national origins.

The courts have held that it would be unconstitutional for English-speaking Defendants to have available a full transcript of all oral testimony and proceedings but to deny the same to a Defendant who does not speak English, or speaks very little English as such classification of that Defendant would be based upon his race or national origins. See: *Loving v. Virginia*, 388 US 1, 18 LE.2d 1010, 87 Supreme Court 1817 (1967); *Hernandez v. Texas*, 347 US 475, 98 LE 866, 74 Supreme Court 667 (1954); *State v. Horn*, 101 Idaho 192, 610 P.2d 551 (1980). Therefore, Claimant argues that he should have the access to the Worker's Compensation court on equal basis as non-minority English speaking Claimants.

Unfortunately, the denial of access to such audio prevented and continues to prevent Claimant from augmenting the records with evidence of the Industrial Commission's "new rule" and the above objections of prohibiting medical records in languages other than English. Claimant has independently attempted to obtain such audio without success. Further, Claimant incurred additional and unnecessary costs as reflected in the court record when claimant's

counsel was required to travel and incur costs to independently obtain a copy of the complete record provided to the Supreme Court of Idaho.

The Claimant acknowledges that the Idaho Court has in the past held that fundamental and constitutional violations can be preserved even if not raised prior to the Supreme Court such as in *State v. Norton*, 37241 (IDCCR) (Ct. App. 2011):

> [T]he exception to the general rule that appellate courts will not consider alleged errors not preserved through an objection at trial arises in criminal cases where the appellant demonstrates fundamental error. *See State v. Adams*, 147 Idaho 857, 861, 216 P.3d 146, 150 (Ct. App. 2009). In order to raise a claim of fundamental error that may be considered for the first time on appeal:
>
> [T]he defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless. If the defendant persuades the appellate court that the complained of error satisfies this three-prong inquiry, then the appellate court shall vacate and remand. *Perry*, 150 Idaho at 228.

The Court in *State* v. *Sutton*, 36819 (IDCCR) (Ct. App. 2011) also stated that a due process right is not waived despite the lack of an objection if the violation is plain error and not a plan on part of the Defendant as a matter of tactics or strategy:

> For an error to plainly exist, there must not be a need for additional information outside the appellate record. *Perry*, 150 Idaho at 228, 245 P.3d at 980. Requiring error to be "plain" is "synonymous with 'clear' or, equivalently, 'obvious.'" *Id.* at 225, 245 P.3d at 977 (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993).

However, Claimant points out that there have been past cases where Idaho Appellate courts have not allowed a party to raise Constitutional claims without a clear record of such.

Finally, Idaho Appellate Rule 29 required the Claimant to also receive a copy of the complete record of audio, filings, exhibits, etc. despite the Industrial Commission's concern that

"they already possess them." Claimant also has the Constitutional due process right to be provided a copy of the withheld documents to ensure that citations and references in the briefs are accurate and to ensure that all exhibits and documents are correctly accounted for.

The provisions of the Workers' Compensation law are to be liberally construed in favor or the employee. *Haldiman v. American Fine Foods*, 117, Idaho 955, 956 (1990). Here, the statutes provide access of the records and information to the Claimant; however, such was denied contrary to such statute and provisions of Workers' Compensation law.

II. THE REFEREE AND THE COMMISSION ERRED AS A MATTER OF LAW OR ABUSED THEIR DISCRETION WHEN THEY DENIED ADMISSION OF THE CLAIMANT/APPELLANT'S MEDICAL RECORDS WHICH WERE CREATED IN HIS NATIVE LANGUAGE IN VIOLATION OF IDAHO JUDICIAL RULES OF PRACTICE AND PROCEDURE G AND IDAHO RULES OF EVIDENCE.

The Idaho Judicial Rules of Practice and Procedure G states as follows:

> **ANY** medical report(s) existing prior to the time of hearing, signed and dated by a physician, or otherwise sufficiently authenticated, may be offered for admission as evidence at the hearing. [Emphasis added]

The Referee and Industrial Commission denied the Admissibility of Medical Records created by Claimant's treating physician on the grounds that the treating physician created the language in Claimant's native language of Spanish (January 10, 2012 Hearing: 72:16 – 73:18. See also Claimant's Exhibit 1, pages 4, 5, 6; Exhibit 6, page 54). The Referee and Industrial Commission required the cost and burden to provide the certified translation shall be borne by the claimant not the Commission (January 10, 2012 Hearing 73:19-24). This ruling was made despite previously stating that the Spanish Medical records were admissible and acknowledging that the Referee and Industrial Commission appointed a Spanish Translator who was present at the hearing, namely a Mercedes Lupercio. (Hearing 4:6-13); January 10, 2012 Hearing: "I will

make note also that while we have the benefit of our interpreter present today, I might have the interpreter interpret for us those portions...." (January 10, 2012 Hearing 24:4-6)

Despite providing such ten days prior to the hearing as required under Idaho Judicial Rules of Practice and Procedure, the record of any objection to such records until the hearing. Further, the record is deplete of any objection at the hearing that the records denied complied with the above rule other than the records being in Spanish.

Statutory interpretation, is an issue of law over which the court exercises free review. *In re Daniel W.,* 145 Idaho 677, 679, 183 P.3d 765, 767 (2008). The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley County,* 132 Idaho 551, 557, 976 P.2d 477, 483 (1999). Statutory interpretation begins with the literal language of the statute. *Paolini v. Albertson's, Inc.,* 143 Idaho 547, 549, 149 P.3d 822, 824 (2006). Provisions should not be read in isolation, but must be interpreted in the context of the entire document. *Westerburg v. Andrus,* 114 Idaho 401, 403, 757 P.2d 664, 666 (1988). The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. *Id.* It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. *AmeriTel Inns, Inc. v. Pocatello-Chubbuck Auditorium Dist.,* 146 Idaho 202, 204, 192 P.3d 1026, 1028 (2008). When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction. *Payette River,* 132 Idaho at 557, 976 P.2d at 483.

Therefore, the plain meaning of a statute will prevail unless it leads to absurd results. *Driver v. SI Corp.*, 139 Idaho 423, 427, 80 P.3d 1024, 1028 (2003).

Idaho Judicial Rules of Practice and Procedure G provides for the cost saving provision for the admission of "any medical reports". No objection was made other than the concern that the Medical records introduced were in Spanish. "Any" means "Any" without limitations, exclusions or exceptions. *United States v. Gonzales*, 520 U.S. 1, 5, (1997) 117 S.Ct. 1032, 137 L.Ed.2d 132 stated as follows:

> Read naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind." Webster's Third New International Dictionary 97 (1976). Congress did not add any language limiting the breadth of that word, and so we must read § 924(c) as referring to all "term[s] of imprisonment," including those imposed by state courts. Cf. *United States v. Alvarez–Sanchez*, 511 U.S. 350, 358, 114 S.Ct. 1599, 1604, 128 L.Ed.2d 319 (1994) (noting that statute referring to "any law enforcement officer" includes "federal, state, or local" officers); *Collector v. Hubbard*, 12 Wall. 1, 15, 20 L.Ed. 272 (1871) (stating "it is quite clear" that a statute prohibiting the filing of suit "in any court" "includes the State courts as well as the Federal courts," because "there is not a word in the [statute] tending to show that the words 'in any court' are not used in their ordinary sense"). There is no basis in the text for limiting § 924(c) to federal sentences.

"All" means "All". The Idaho Supreme Court in *Sweitzer v. Dean*, 118 Idaho 568, 572 (Idaho 1990), stated as follows:

> When referring to "chapter 9, title 6", I.C. § 50-219 states, "all claims for damages against a city must be filed as prescribed by chapter 9, title 6, Idaho Code." (Emphasis added.) Black's Law Dictionary (5th ed.), defines the word "prescribe" to mean, "[t]o lay down authoritatively as a guide, direction, or rule; to point to, to direct; to give as a guide, direction or rule of action." *Applying the plain meaning of the words "all"* and "filed" in conjunction with that of the word "prescribe," may clearly be construed to mean that all damage claims are to be filed as directed by or in the manner set forth in the ITCA.

Though "Control of discovery is within the discretion of the trial court. *Avila v. Wahlquist,* 126 Idaho 745, 749, 890 P.2d 331, 335 (1995); the initial question of relevancy of evidence is a question of law over which this Court exercises free review. *State v. Hairston,* 133 Idaho 496, 502, 988 P.2d 1170, 1176 (1999)." *JEN–RATH CO., INC., v. KIT MANUFACTURING COMPANY.* 137 Idaho 330, 336 (2002). Accordingly this court is able to exercise free review over the question of whether or not the evidence submitted by Claimant and denied herein. The Referee and Industrial Commission refused the translation of these records and therefore abused their discretion to appropriately determine if the medical records were admissible despite a court certified translator being present and able to orally translate such. (January 10 Hearing, 4:6-13; 24: 4-6)

Finally, the Idaho Court in *Medrano v. Neibaur*, 136 Idaho 767 (Idaho 2002) found it an abuse of discretion when the court disregarded its own deadline set in a court order; therefore the Referee and Industrial Commission abused its discretion when it disregarded its own Judicial Rules of Practice and Procedure for the introduction of "All" Claimant's Medical Records especially after Claimant limited the number of exhibits that were to be translated by the appointed certified court translator.

III. THE REFEREE AND THE COMMISSION ERRED AS A MATTER OF LAW OR ABUSED THEIR DISCRETION WHEN THEY DENIED THE ADMISSION OF THE CLAIMANT/APPELLANT'S MEDICAL RECORDS WHICH WERE CREATED IN HIS NATIVE LANGUAGE UNLESS HE COULD AFFORD A CERTIFIED TRANSLATION IN VIOLATION OF THE CLAIMANT/APPELLANT'S STATE AND FEDERAL EQUAL PROTECTION AND DUE PROCESS RIGHTS.

Claimant and other similarly situated minority non-English speaking Claimants' rights are violated by the "new rule" in violation of both the state and federal constitutional rights to substantive and procedural due process and equal protection when they adopted the new policy of refusing to admit any medial records if it is in the language of the Claimant's Spanish language or was unable to afford the additional cost and burden to provide a certified translation of such. See: United States Constitution, Amendments 5 and 14; and Idaho State Constitution, Article 1, Sections 13 and 18.

The Appellate court stated in *Cacciaguidi v. State*, 37063 (IDCCA) (App. Ct. 2011), "The Due Process Clauses of the United States and Idaho Constitutions forbid the government to deprive an individual of life, liberty, or property without due process of law. U.S. Const. amend. XIV; Idaho Const. art. I, § 13." The court also recently stated that, "...every defendant has a Fourteenth Amendment right to due process and it is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process." *State v. Grove*, 36211 (IDCCR) (App. Ct. 2011); *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2259 (2009)

No person or Claimant shall be deprived of "life, liberty, or property without due process of law," establishes the important concept of individual fairness in the American judicial system. Increased immigration and demographic changes in language use occurring in Idaho and throughout the nation challenge fundamental guarantees of individual fairness. These guarantees include the rights of due process set forth in the 5th and 14th Amendments. A recent Harvard Latino Law Review Article (vol. 7) entitled, "The Changing Face of Justice: A Survey of Recent

Cases Involving Courtroom Interpretation" written by The Honorable Lynn W. Davis et. al., and while referring to the U.S. Census Bureau Report, Language Use and English-Speaking Ability: 2000 1-10 (2003), *available at* http://www.census.gov/prod/2003pubs/c2kbr-29.pdf stated the following:

> The data collected by the Census Bureau demonstrates that a significant portion of the United States population does not consider English to be its native tongue. Almost 47 million individuals, or eighteen percent of the total U.S. population over the age of five, speak a language other than English at home. Furthermore, of those 47 million people who do not speak English at home, 24.1 million indicated that they have difficulty speaking and understanding the English language. Under this analysis, at least 24 million individuals living in the United States would require interpretation services if haled into court.

Therefore, allowing a translator that was already appointed, to translate to English, especially from Spanish, is not uncommon and such should be taken into account especially due to the Hispanic population within our county and state. While it is acknowledged that speaking English in the United States may be recommended for various reasons, the law is clear in the United Stated and in Idaho that does not require any resident or citizen to speak English. Also, any argument to require individuals to speak English and ensure all their medical records are provided in English would increase the costs and expenses for every non English speaker

The courts have held that it would be unconstitutional for English-speaking Defendants to have available a full transcript of all oral testimony and proceedings but to deny the same to a Defendant who does not speak English, or speaks very little English as such classification of that Defendant would be based upon his race or national origins. See: *Loving v. Virginia*, 388 US 1, 18 LE.2d 1010, 87 Supreme Court 1817 (1967); *Hernandez v. Texas*, 347 US 475, 98 LE 866, 74

Supreme Court 667 (1954); *State v. Horn*, 101 Idaho 192, 610 P.2d 551 (1980). Therefore, it would be unconstitutional for Claimant and similarly situated minorities to either not be able to introduce their original medical records or to be required to incur that additional expense and cost not required of non-minority similarly situated claimants.

As outlined above, even though the Industrial Commission denied the informal and formal request for the audio, notes, and complete record and denied the request to augment the record to preserve all arguments and objections made to the 'new rule"; Claimant asks this court to hold that Claimants fundamental and constitutional violations by the "new rule" should be preserved such as allowed in *State v. Norton*, 37241 (IDCCR) (Ct. App. 2011):

> [T]he exception to the general rule that appellate courts will not consider alleged errors not preserved through an objection at trial arises in criminal cases where the appellant demonstrates fundamental error. *See State v. Adams*, 147 Idaho 857, 861, 216 P.3d 146, 150 (Ct. App. 2009). In order to raise a claim of fundamental error that may be considered for the first time on appeal:
>
> [T]he defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless. If the defendant persuades the appellate court that the complained of error satisfies this three-prong inquiry, then the appellate court shall vacate and remand. *Perry*, 150 Idaho at 228.

The Court in *State* v. *Sutton*, 36819 (IDCCR) (Ct. App. 2011) also stated that a due process right is not waived despite the lack of an objection if the violation is plain error and not a plan on part of the Defendant as a matter of tactics or strategy.

> For an error to plainly exist, there must not be a need for additional information outside the appellate record. *Perry*, 150 Idaho at 228, 245 P.3d at 980. Requiring

error to be "plain" is "synonymous with 'clear' or, equivalently, 'obvious.'" *Id.* at 225, 245 P.3d at 977 (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993).

The Referee and the Industrial Commission's "new rule" violated Claimants right when they refused to admit his medical records created in his native language as Claimant is a minority and receives the Constitutional protections outlined above. Further, The Referee and the Industrial Commission's "new rule" also violated Claimants right when they require minorities only to incur the additional cost and burden to pay for and provide a certified translation of the medical records created in the Claimants' native language that is other than English.

"The most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities." *-Lord Acton (John E. E. Dalberg Acton) English historian, statesman (1834-1902).* "Our courts are the great levelers." *Roughly paraphrased from the movie, "To Kill a Mockingbird"*

IV. THE REFEREE AND THE COMMISSION ERRED AS A MATTER OF LAW OR ABUSED THEIR DISCRETION WHEN THEY WITHDREW THE CLAIMANT/APPELLANT'S COURT-APPOINTED TRANSLATOR AND REFUSED TO ALL THE COURT INTERPRETER TO ORALLY TRANSLATE EXHIBITS WRITTEN IN HIS NATIVE LANGUAGE IN VIOLATION OF THE CLAIMANT/APPELLANT'S STATE AND FEDERAL SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS.

Claimant, pursuant to his request and due to his Spanish monolingual inability to understand the English language was appointed a Court appointed Certified Translator, Mercedes Lupercio who was present and able to translate for the Claimant and the Industrial Commission testimony and records. (January 10 Hearing 4:6-13; 24: 4-6)

Despite Claimant withdrawing various medical records to simplify the translation for the Court Appointed Certified Translator, The Referee and Industrial Commission withdrew Claimant's ability to utilize the Certified Translator to translate Claimant's medical records in violation of Claimant's substantive and procedural State and Federal due process rights. See:

United States Constitution, Amendments 5 and 14; and Idaho State Constitution, Article 1, Sections 13 and 18.

Idaho Court Administrative Rule 52, Policy Declaration Relating To Court Interpreters and preservation of constitutional rights, states as follows:

> (a) Statement of Policy. It is the policy of the Supreme Court and the intent of these rules to secure the rights, constitutional and otherwise, of persons who, because of a non-English-speaking cultural background or physical impairment, are unable to understand or communicate adequately in the English language when they appear in the courts or are involved in court proceedings, or are otherwise seeking access to the courts.

Idaho Code 9-205, Interpreters, states as follows:

> In any civil or criminal action in which any witness or a party does not understand or speak the English language, or who has a physical disability which prevents him from fully hearing or speaking the English language, then the court shall appoint a qualified interpreter to interpret the proceedings to and the testimony of such witness or party. Upon appointment of such interpreter, the court shall cause to have the interpreter served with a subpoena as other witnesses, and such interpreter shall be sworn to accurately and fully interpret the testimony given at the hearing or trial to the best of his ability before assuming his duties as an interpreter. The court shall determine a reasonable fee for all such interpreter services which shall be paid out of the district court fund.

The Appellate court in *State v. Herrera*, 233 P.3d 147, 149 Idaho 216, 222 (Idaho App. 2009) stated as follows:

> A court's decision regarding appointment of an interpreter is generally discretionary, *State v. Alsanea,* 138 Idaho 733, 741, 69 P.3d 153, 161 (Ct.App.2003), but a question as to whether a trial court's decision met minimum statutory or constitutional requirements is an issue of law subject to free review. *Anderson,* 144 Idaho at 746, 170 P.3d at 889; *State v. Bowman,* 124 Idaho 936, 940, 866 P.2d 193, 197 (Ct.App.1993).

The Referee and Industrial Commission's decision to withdraw the use of the Court appointed Certified Translator violated Claimant's Statutory and Constitutional right to understand and to be understood. The Idaho Appellate court in *State v. Herrera*, 233 P.3d 147, 149 Idaho 216, 222 (Idaho App. 2009) stated as follows.

> The interpretation of statutes and judicial rules is also a matter of free review. *State v. Reyes,* 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct.App.2003). *State v. Slater,* 133 Idaho 882, 888, 994 P.2d 625, 631 (Ct.App.1999). Where the language is plain and unambiguous, we give effect to a statute as written and may not add to nor subtract from the statute by judicial construction. *Parsons v. Mutual of Enumclaw Ins. Co.,* 143 Idaho 743, 746, 152 P.3d 614, 617 (2007); *State v. Rhode,* 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); *State v. Burnight,* 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar,* 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct.App.2000). When interpreting a statute, we give the statutory language its plain, obvious, and rational meaning. *Burnight,* 132 Idaho at 659, 978 P.2d at 219.

The Industrial Commission's withdrawal of Claimant's Certified translator and refusal to allow him to translate the remaining medical documents was in violation of the above statutes. The burden is on the government who seeks to take away the right of the Claimant. *U.S. v. Mosquera*, United States District Court, 816 F.Supp. 168 (1993), 61 USLW 2642. The Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Goldberg v. Kelly*, 397 U.S. 254 (1970) clarifies that the benefits being provided to the Claimant can not be taken away without due process. Taking away benefits that were provided in a worker's compensation case still requires due process parallel those rights in *Goldberg* and *Mathews; See American Manufacturers Mutual Insurance Company v. Sulivan*, 526 U.S. 40, 60-61 (1999).

Further, costs alone normally do not override constitutional rights; *See Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (indigent criminal defendant has right to court-appointed counsel); *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (convicted indigent defendant entitled to copy of transcript for appeal at government expense). "The use of courtroom interpreters involves a balancing of the defendant's constitutional rights to confrontation and due process against the public's interest in the economical administration of criminal law." *United States v. Martinez,* 616 F.2d 185, 188 (5th Cir.1980), *cert. denied,* 450 U.S. 994, 101 S.Ct. 1694, 68 L.Ed.2d 193 (1981). If the government cannot afford to provide due process to those it prosecutes, it must forego prosecution.

V. THE REFEREE AND THE COMMISSION ERRED AS A MATTER OF LAW OR ABUSED THEIR DISCRETION WHEN THEY FAILED TO GRANT THE RELIEF REQUESTED IN THE CLAIMANT/APPELLANT'S FIRST AND SECOND VERIFIED MOTIONS FOR SANCTIONS WHICH REQUESTED SANCTIONS OR AN ORDER TO COMPEL FILED ON OR ABOUT SEPTEMBER 1, 2011 AND THE ASSOCIATED ORDERS ON MOTION DATED NOVEMBER 4, 2011 AND FILED ON OR ABOUT NOVEMBER 23, 2011.

The Idaho Industrial Commission is not normally subject to the Idaho Rules of Civil procedures. However, in JRP 7(C) the Commission has adopted by reference the Idaho Rules of Civil Procedure regarding discovery. Because the Industrial Commission has chosen to adopt the I.R.C.P. discovery provisions, they are bound to follow them. The purpose of discovery is to "obtain the fullest possible knowledge of the issues and facts before trial." 329 U.S. 495, 501 (1947) also see *Lester v. Salvino*, 141 Idaho 937 (Ct. App. 2005).

IRCP 26(b)(1) states that "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" which specifically includes "the identity and location of persons having knowledge of any discoverable matter.". The IRCP permits broad discovery of any non-privileged matter, even if it is inadmissible, so long as it is "reasonably calculated to lead to the discovery of admissible evidence." I.R.C.P. 26(b)(1), *see Kirk v. Ford Motor Co.*, 141 Idaho 697, 703-704.

The party resisting discovery carries a heavy burden. Under the liberal discovery provisions of the Idaho Rules of Civil Procedure discussed above, the party resisting discovery carries "a heavy burden of showing why discovery was denied." *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). The party resisting discovery must justify each objection, 8 Wright & Miller, §2263, at 737, and is required to show specifically how each objection applies to the discovery request. *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 297 (E.D. Pa. 1980).

Claimant alleged he was injured at an on the job from a fall from a ladder and subsequently transferred to a light duty job for two weeks after the accident (Agency Record, 55: 8) and Defendants Answered the Complaint and denied the following allegations: (Agency Record, 5)

1. That the accident or occupational exposure allege in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused partly or entirely by an accident arising out of and in the course of Claimant's employment.

5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: $TBD

As the Defendants denied each and every item above, including that the employee relationship existed, Claimant carried a high burden to prove each of the items requested in discovery and had the rights and responsibility to obtain such records when the Defendant employer Roberto Corral, Sr. (President), Corral Agriculture, Inc (Records Custodian), Jorge Coronado (Supervisor) failed to timely answer discovery and failed and refused to appear at the time set for deposition set for the 1st of September 2011 and the Defendants Roberto Corral Sr (President) and Luisa Corral (Secretary) failed to appear at trial despite subpoenas being issued signed by the Industrial Commission on the 23rd of January 2012. (Claimant's Exhibit 23-24, Hearing Transcript 355) (Agency Record, 8-18, 38-43). Defendants acknowledged in Defendants' Response to Claimant's Second Verified Motion for Sanction (Agency Record, 45) that "These responding defendants do acknowledge the fact that, to date, the list of employees working for the defendant employer during the time period of September 5-26, 2010 have not yet been provided."

Defendant's incomplete and untimely disclosure on the 15th of December 2011 with outdated I-9 addresses of the employees did not contain any current address in the possession of Defendant and the vice president of the company testified at his deposition that the employees that were working with the Claimant in 2010 returned to work for Roberto Corral, Jr. at his new business and that he had not requested the payroll records from his agent "Ashmead and Associates in Nampa." (Deposition of Roberto Corral Jr., 5:21 – 6:3)

Despite Defendants admission that the disclosure was late and that the Defendants made no efforts to provide the payroll records containing the current addresses of the employees that were working with Claimant and only providing the outdated i-9s, the Industrial Commission denied Claimant's Second Verified Motion for Sanctions.

Finally, despite timely serving discovery on the Defendants and making every effort through depositions, motions to compel, motions for sanctions, motions to certify the contempt to the district court regarding the failure to provide contact information regarding coworkers at the time of the accident (Agency Record, 8-18, 38-43), and issuing subpoenas to the Defendants to appear at the hearing, and the Defendants failed to comply, the Industrial Commission ultimately ruled that "Claimant has not proven that he suffered an accident while picking apples for Corral Agriculture at Williamson Orchards on or about September 10, 2010." (Agency Record, 63) The current addresses in the payroll records of the Defendants of various witnesses that were present at the time of the accident and thereafter were the key to Claimant's case as they would testify that they were present, saw the accident, observed Claimant notify his

supervisors of the accident, that they observed the Claimant be transferred for two weeks to light duty because of the accident, that they overheard Claimant receive payments from the Defendant for the accident, etc.

Claimant demonstrated that he made every reasonable and independent attempt to locate the current address and contact by submitting the certified letter to the last address provided wherein the letters were returned without forwarding address. (Claimant's Exhibit 18 p. 1-45 and Claimant's Exhibit 19). The Idaho Supreme Court clearly outlined that a party should not benefit or be rewarded at trial by playing games and withholding evidence in discovery as took place herein. The Idaho Supreme Court in *Edmunds v. Kraner*, 142 Idaho 867, 873, 136 P.3d 338 (2006) stated as follows:

> The purpose of our discovery rules is to facilitate fair and expedient pretrial fact gathering. It follows, therefore, that discovery rules are not intended to encourage or reward those whose conduct is inconsistent with that purpose.

Defendants herein benefited from the refusal honor the subpoena served upon Roberto Corral Sr. and Luisa Corral and refuse to appear and testify in person or telephonically. Defendants herein benefited from the refusal to answer discovery and even refused to honor the Order to Compel issued the 4th of November 2011 (Agency Record, 36)

Discovery was served on Defendants on or about the 3rd of May 2011 and Defendants responded to discovery on the 11th of July 2011 beyond the 30 day requirement for discovery rules and therefore waived any and all objection to such discovery.

The case law clearly states that a discovery objection is waived if not made when the discovery answer is required as reflected in the following Civil Cases. *In Ashby v. Western Council, Lumber Production and Indus. Workers,* 117 Idaho 684 (1990), the court stated, "If in fact the interrogatories are beyond the legitimate scope of discovery, the proper procedure is to object to them in a timely manner." *Ashby* at 687. "The law is well established that the failure to timely file objections to interrogatories operates as a waiver of any objections the party might have. This rule is generally applicable 'regardless of how outrageous or how embarrassing the questions may be.' When a party fails to file timely objections, the only defense that it has remaining to it is that it gave a sufficient answer to the interrogatories." *United Nuclear Corp. v. General Atomic Company*, 629 P.2d 231, 286 (New Mexico 1980). "Generally, in the absence of an extension of time or good cause, the failure to object to interrogatories within the time fixed by Rule 33, FRCivP, constitutes a waiver of any objection." *Davis v. Fendler* 650 F.2d 1154 (9th Cir. 1981 Ariz.).

The scope of discovery is clear and broad: I.R.C.P. 26(b)(1) permits broad discovery of any matter that is not privileged, even if it is inadmissible, so long as it is "reasonably calculated to lead to the discovery of admissible evidence." I.R.C.P. 26(b)(1)(2004). The United States Supreme Court stated, "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 501 and 506 (1947). See also *Lester v. Salvino*, 141 Idaho 937, (Ct. App. 2005); and *Sanders v. Ayrhart*, 89 Idaho 302 (1965).

7 Moore's Federal Practice, 33.102[1] (Matthew Bender 3d ed) state, "that you have an affirmative duty to furnish any and all information available to [you]. Also, "In the case of an organizational party to an action, the duty to provide all information available refers to any information imputed to the organizational party itself, including information possessed by officers, employees, and former employees of the party as well as the party's counsel." Id. 33.102[2]. "[R]equests for production should not be read or interpreted in an artificially restrictive or hyper technical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions." Fed. R. Civ. P. 37(a) advisory committee's note (1993).

Defendants' nevertheless failed and refused to completely answer Claimant's interrogatory No. 10 for the following:

> ...state the name of all employees that were employed with the employer during September through November 2010 with their full name, address, title, phone number, address and if they have any knowledge of the accident herein.
>
> ANSWER TO INTERROGATORY NO. 10:
>
> ....Further, defendants object to this interrogatory relative to the names of all employees who were employed with the employer during September through November 2010, as such information requested is not relevant, and responding to that portion of the interrogatory will not lead to the discovery of any relevant information. Without waiving this objection, an attempt will be made to obtain such information and, if available, such information will be provided to you at a later date.

Defendants also failed and refused to completely Claimant's Request for Production No. 9 for the following:

> Please produce the entire copy of Claimant's file including but not limited to pay stubs, time cards, employee manuals, payment records, correspondence, etc. Also, please produce the same employee file for the individuals listed in Answer to Interrogatory No. 10, and any statement(s), affidavit(s), report(s) or writing(s) or note(s) of such. Also, include the time cards for the Claimant and all employees that were employed or paid by the Defendant from September to August 2010.
>
> RESPONSE TO REQUEST NO. 9:
>
> Using the employment records release signed by the claimant June 14, 2011, an attempt will be made by the undersigned to obtain such employment records and provide those to you at a later date. However, no such information will be provided to you concerning any employee other than the claimant. ...

Claimant filed a Motion for Sanctions or for alternatively for an Order to Compel (Agency Record, 8-18) and Defendants, in the Defendants' Response to Claimant's Motion for Sanctions or For Emergency Hearing, failed to argue against the relevancy of the items requested in Claimant's Discovery. (Agency Record, 29-30), (Agency Record, 8-18, 38-43), (Defendants' Responses to Claimant's Discovery Request, See also Exhibit C to Deposition of Roberto Corral, Jr. taken December 15, 2011, Claimant's Rule 10 Exhibit, and Exhibit C to Deposition of Joyce Ellefson but denied admission by the Industrial Commission)

Defendant's Responses to Claimant's Discovery Requests Claimant submitted the required Meet and Confer letter, outlined the specific discovery deficiency and filed the Motion to Compel (Agency Record, The Referee and the Industrial Commission erred as a matter of law by refusing to order the complete production of the items requested above as the objections made did not provide sufficient grounds to deny Claimant's request to equal access to the witnesses

that worked with Claimant and could testify to the accident, notice of the accident, payments regarding the accident, credibility and or background of the Defendants, etc.

After attempts to obtain the information from Defendants, Claimant filed a Motion for Sanctions or for Emergency Hearing. As a result the Industrial Commission Referee, on November 4, 2011, ordered that Defendants produce "a list of the names, telephone numbers, and addresses of all of Employer's employees during the period of September 5-26, 2010. Defendants are also ORDERED to produce to Claimant within 21 days of this Order a complete copy of the Employer's employee file of Claimant." (Agency Record, 36)

Defendants refused to comply with the order of the Commission and submitted time sheets for only the 5th-12th of September 2010 and only Form I-9's for the employees. Under the rules of discovery an "evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond." Rule 37(a)(3), Idaho and Federal Rules of Civil Procedure. Defendant's claimed they were doing all they could to locate the information, but testified in deposition that they had not sought records from payroll.

In response to Defendant's refusal to comply with the Commissioners order, Claimant filed a Second Verified Motion for Sanctions. In this motion the Claimant asked for sanctions and default, or alternatively that the Commission certify facts to the District Court pursuant to Contempt Powers under Idaho Code § 72-715. The Commission denied the motion, without explanation, during a telephonic hearing.

Because the Defendants had no valid justification for their withholding of vital information regarding potential eyewitnesses and the current address for subpoena purposes, it was an abuse of discretion for the I.C. to deny Plaintiffs order for sanctions and to compel.

The Industrial Commission is not free to disregard the plain application of the Idaho Rules of Civil Procedure regarding discovery because it has adopted such through JRP 7(C) The plain language of IRCP 26 and the large weight of the case law interpreting it demonstrate that denying a discovery request for the identification of potential eyewitnesses able to testify to the heart of the proceeding without justification is outside the Commission's discretion.

Even if the matter is correctly perceived as one of discretion, the Commission has acted outside of the boundaries of its discretion and outside the legal standards applicable to the specific choices available to it. While the Commission is able to adopt its own procedures in the interest of speedy and fair resolutions to the controversies before it, they are not immune from being held to their own adopted rules. In *Madison v. J.I. Morgan, Inc.* 115 Idaho 141 (1988) the Supreme Court of Idaho reversed a decision by the Commission and remanded for hearing when they failed to follow the plain language of their adopted rule regarding post hearing depositions. 115 Idaho 141. In *Madison* the Court stated that Industrial Commission Rule IX(c) specifically provides that, "Following a hearing the record *shall* remain open for the submission of evidence by deposition for the following periods...." and held that failure to allow the employer to take a deposition within the specified time frame was sufficient reason to remand the case.

In the instant case Defendants only justification to the court for their failure to provide information about their own employees was that they were doing their best. This assertion came despite their failure to contact their payroll regarding addresses and numbers of their employees. Such conduct by the Defendants warrants the imposition of sanctions as "The motivation to stonewall is so great that offenders will not comply with discovery requests unless they know in advance of litigation that the cost of stonewalling will be greater than the benefits. *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 Harv. L. Rev. 1033 (1978). Also, just as in *Madison*, denying the Plaintiff's motion to compel and for sanctions constitutes a clear error sufficient to remand the case.

Not only was the Commission's decision to deny the Claimant's Motion for Sanctions in violation of the rules of discovery adopted by the Commission but it was also in direct conflict with its own order. When the Commission ignores its own order in a way that is prejudicial to one of the parties, it constitutes an abuse of discretion. In *Medrano v. Neibaur* the Supreme Court of Idaho found an abuse of discretion when the Commission allowed an attorney to submit a memorandum of costs six months after the deadline found in its own order regarding attorney's fees. 136 Idaho 767 (2002).

In the instant case the Commission has allowed Defendant to ignore or refuse to comply with its order demanding they produce vital information sought in discovery. As in *Neibaur*, the Commissions disregard for its own order has caused harm and prejudice to the Claimant and constitutes an abuse of discretion.

VI. THE COMMISSION DID NOT HAVE SUBSTANTIAL AND COMPETENT EVIDENCE TO DENY MR. FONSECA'S CLAIM BECAUSE IT ABUSED ITS DISCRETION WHEN IT FAILED TO ENFORCE ITS ORDER TO COMPEL DISCOVERY AND THE COMMISSION DID NOT ACCOUNT FOR EVIDENCE PRESENTED.

A three-part test is used when reviewing whether a court abused its discretion. This Court determines "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Sun Valley Shopping Ctr. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991) (quoting *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989)). The Industrial Commission abuses its discretion when it fails to follow its own orders. *Medrano v. Neibaur*, 136 Idaho 767, 40 P.3d 125 (2002). *See also Madison v. J.I. Morgan, Inc.*, 115 Idaho 141, 145, 765 P.2d 652, 656 (1988) (reversing protective order of the referee which violated J.R.P. IX).

1. The Commission's disregard of its own discovery order is an abuse of discretion and unfairly prejudiced Mr. Fonseca's case because it denied him the opportunity to question and present witnesses who would have supported his claim and likely altered the outcome of his trial.

This Court held that the Commission abused its discretion when it allowed the Claimant in *Medrano* to submit his memorandum of costs months after the ten day deadline in disregard of its own order. *Medrano*, 136 Idaho 767, 769-770. Moreover, the *Medrano* Court reasoned that the Commission's disregard of its own order was unfair to the employer because it had a right to rely on the order. *Id.* Therefore, this Court reversed the Commission's order. *Id.*

Similarly, the employer in *Madison* argued the referee's refusal to allow the post hearing deposition of the company president violated its right to a fair hearing. *Madison,* 115 Idaho 141, 144. Specifically, the Defendants argued the president would have certified a job offer, which in turn would have altered the outcome of the case because the Claimant's vocational rehabilitation specialist would have changed her opinion had she known of the offer. *Id.*

The *Madison* Court implicitly agreed that the Defendants right to a fair hearing had been denied when it found the Commission's refusal to permit the testimony to be dispositive over several issues raised by the Defendants. *Id.* The Court found that the strict interpretation of J.R.P. IX required the Commission to allow the post hearing deposition. *Id.* Accordingly, the Court set aside the decision and remanded to the Commission with instructions to reopen and take the testimony of the employer president. *Id.*

Moreover, the *Madison* Court reached its decision over a strident dissent. Justice Huntly argued that the majority "wanders into gross error" by valuing the letter of the rule over the inherent power of the Commission, particularly when the president's testimony was neither needed to support the Defendant's position, nor would it have changed the outcome. *Madison*, 115 Idaho 141,145-146. Justice Bistline also argued that the president should not be granted a second chance to testify since "...the opportunity to be heard was presented and quietly eschewed." *Id* at 147-148.

Similarly, the *Medrano* Court reached its decision over the dissent of Justice Eismann who argued that the Commission had the discretion to direct that the memorandum be submitted

within ten days, therefore it also had the discretion to extend the time absent prejudice to the employer. *Medrano,* 136 Idaho 767, 770.

Here, Mr. Fonseca testified that there were five or six people in the area where he fell, and about 20 people who heard the description of the accident soon afterward, and that those witnesses heard him tell his supervisor of the accident on that day; the Referee ordered the Defendants to produce the names, telephone numbers, and addresses of all Employer's employees during the period of September 5-26, 2010, the Defendants acknowledged they had not provided the list, and the Referee took no action to ensure the production of these documents. (T.H. 76:10-13; T.H. 79:9-11T.R. 36, 45, 51). Additionally, the Claimant testified that he told the Defendants Roberto Corral, Sr. and Luisa Corral, Secretary, of his accident several times and had discussed the check which bounced that he needed to pay for medication. (T.H. 81:21-90:16). However, those witnesses failed to appear at the deposition scheduled and properly noticed on September 1, 2011 (C10:2 - 6).

Just as the Defendant's inability to obtain post-trial deposition of the company president denied the employer in *Madison* a fair trial because his testimony would likely have changed the opinion of the Claimant's vocational assessment counselor, Mr. Fonseca's inability to question and present his witnesses prejudiced his case and denied him a fair trial, because those witnesses could have presented evidence to support the Claimant's testimony regarding his accident.

Additionally, just as the Commission's decision to extend the time frame for filing the attorney fee memo in disregard of its own order constituted an abuse of discretion both because it

disregarded the order and because it was unfair to the employer in *Medrano* since the employer the Commission's disregard of its own order on discovery in this case is an abuse of discretion both because it disregarded the order and because it was unfair to Mr. Fonseca since he had a right to rely that he would be able to question witnesses to support his case.

Moreover, unlike the company president in *Madison* who was heard at trial and whose order for post-trial testimony the dissent argued was unnecessary, would not have changed the outcome, and interfered with the discretion of the Commission, Mr. Fonseca's witnesses were not heard, would likely have changed the outcome, and support the Referee's order rather than infringe on the Commission's discretion.

Additionally, unlike the Commission's decision to extend the time for filing the memorandum in *Medrano* which the dissent would have upheld because it argued there was no prejudice to the employer and the Commission was within its discretion, the prejudice to Mr. Fonseca's case was fatal to his claim, and the Commission was not within its discretion to disregard its own order as discussed *supra*.

Therefore, just as this Court set aside the decision and remanded to the Commission with instructions to reopen and take the testimony of the president in *Madison,* and reversed the Commission's decision in to allow attorney fees in *Medrano*, this Court should either set aside the decision in this case, and remand to the Commission with instructions to re-open, or reverse the decision of the Commission and find that Mr. Fonseca had an accident.

Moreover, the Commission's decision is not based upon substantial and credible evidence when this abuse of discretion taken together with its failure to account for evidence presented to it as discussed *infra.*

2. The decision of the Commission is not supported by substantial and credible evidence because it did not account for witness statements presented by Mr. Fonseca who were at the scene, the Defendants failed to present any evidence or supply any witnesses that were at the scene of the accident, one of the Defendant's witnesses did not work for the employer until after the accident, the Defendants admitted that they failed to attempt to investigate or locate witnesses to the accident, and neither the company president or secretary failed to appear for deposition, testify telephonically, or provide any evidence to dispute Mr. Fonseca's contentions.

Mr. Fonseca, Nazario Marquez and Bruno Aguilar were the only people present on the day of and at the site of the accident. Mr. Fonseca presented letters from both Misters Marquez and Augilar which described the accident. (C19:1 - 6). The Defendants did not present any evidence which contradicted these letters.

The Defendants admitted that they failed to attempt to investigate or locate witnesses to the accident. Roberto Corral, Jr. did not perform any investigation into Mr. Fonseca's accident and would not have done any different investigation if Mr. Fonseca had notified him of the accident on November 1, 2010. (TH 318:13 – 319:1; Deposition of Roberto Corral, Jr. 29:14 - 25). Additionally, Mr. Corral, Jr. did not attempt to contact any of the witnesses that were working on the September 10, 2010 even though about half of them still work for him. (TH 321:1 – 18).

Even after Roberto Corral, Jr. was made aware that Claimant sent letters to the coworkers working in September 2010 and was provided three letters from coworkers working on with Mr.

Fonseca on September 10, 2010, during the accident injury, Roberto corral, Jr. did not attempt to contact these witnesses. (TH 322:4 – 15)

Roberto Corral, Sr. and Louisa Corral failed to appear for deposition, testify telephonically, or provide any evidence to dispute Mr. Fonseca's contentions.

CONCLUSION

For the foregoing reasons, Mr. Fonseca respectfully requests that this Court either reverse the order of the Commission, or remand his case to the Commission with instructions to reopen his case to consider evidence consistent with Mr. Fonseca's arguments in this brief.

DATED this 22nd day of May, 2013.

Respectfully submitted,

Richard L. Hammond

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May I delivered a true and correct copy of the foregoing BRIEF OF THE CLAIMANT/APPELLANT to the following via hand delivery and facsimile:

David J. Lee
Idaho State Insurance Fund
1215 W State Street
Boise, ID 83720

Fax No.: 208-332-2225

By: _____
Gregory O. Lawson